Supreme Court, U. S.
FILED
FEB 24 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1976

NO. 76-451

ALABAMA POWER COMPANY,

Petitioner,

versus

RAYMOND E. DAVIS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF LOCKHEED-GEORGIA COMPANY, A DIVISION OF LOCKHEED AIRCRAFT CORPORATION, AMICUS CURIAE

Of Counsel:
RALPH H. GREIL
Troutman, Sanders,
Lockerman & Ashmore

CARL E. SANDERS
MICHAEL C. MURPHY
JOHN L. TAYLOR, JR.
Troutman, Sanders,
Lockerman & Ashmore
1400 Candler Building
Atlanta, Georgia 30303

ROBERT P. BARTON
Assistant Counsel
Lockheed-Georgia Co.

Attorneys for Amicus Curiae
Lockheed-Georgia Company, a
Division of Lockheed Aircraft
Corporation

February 1977

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INTEREST OF AMICUS CURIAE

Lockheed-Georgia Company, a division of Lockheed Aircraft Corporation of Burbank, California, is engaged in the manufacture and modification of aircraft, and has its principal place of business in Marietta, Georgia. Lockheed Aircraft Corporation employs approximately 55,000 persons, over 9,000 of which work for Lockheed-Georgia Company. Both Lockheed-Georgia and Lockheed Aircraft Corporation are effectively doing business in more than one judicial circuit.

In December 1965, Lockheed Aircraft Corporation established an Hourly Employees Basic Benefit Plan and Hourly Employees Savings Plan which covers

employees of Lockheed-Georgia, and other divisions of Lockheed Aircraft Corporation. These plans were the result of collective bargaining agreements and were intended to be additional benefits for hourly employees independent of, and in addition to, the Lockheed Pension and Retirement Plans.

Under the basic benefits plan, coverage is automatic to an hourly employee in a covered group. The corporation contributes $20 per quarter for each covered employee who meets the eligibility requirements for company contributions, regardless of the employee's salary or length of service. The contribution is made to one of two trustee-managed investment trust funds of either securities or bonds. Money the account earns such as interest or dividends, is added to the account as it accrues. To be eligible to receive contribution credits, an employee must meet a substantial work requirement by being "on active status for the quarter." "Active status for the quarter" is defined by the plans and by company policy as being physically at work on more than one-half of the working days of the quarter (leaves of absence of thirty days or less considered physically at work) and being, during the remaining days of the quarter, on either a prolonged leave of absence of more than thirty days or on a layoff of less than twenty-eight days.

The savings plan is voluntary rather than automatic. An electing employee authorizes deductions from his weekly paychecks in varying amounts depending on the length of the employee's service with the company. The corporation then contributes an amount equal to 50% of the employee's deduction, and both sums go into either a securities or bond investment trust fund.

Under both plans, employees or their beneficiaries receive the unit value of all contributions upon retirement, entry into the Armed Forces, disability, lay-offs of more than four weeks, or death. In the basic benefit plan, if the employee terminates his employment for other reasons, the amount of corporate contributions he receives from the trust fund depends upon the length of service rendered the company. Contributions to the plans are intended to be rewards or additional compensation for work to be performed after establishment of the plans. No contributions are awarded for previous employment.

After establishment of these plans, Lockheed employees from time to time terminated their employment and entered the Armed Forces. Pursuant to the express terms of the basic benefit plan, all benefits accumulated as of the time of their induction were paid to the employee. The company made no further contributions to the basic benefit plan during the time these former employees were in the military service, unless in a particular quarter the employee met the work requirement of the plan. In this respect the former employee was treated like any other employee on a leave of absence of more than thirty days. Additionally, no 50% contributions were made to the savings plan during this same period since there were no corresponding employee contributions from earnings.

In December 1976, four suits were brought against Lockheed-Georgia under Title IV of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. §§ 2021-2026 (formerly section 9 of the Military Selective Service Act, *as amended*, 50 U.S.C. App. §

459).[1] These actions were brought by the United States Attorney for the Northern District of Georgia on behalf of four former employees of Lockheed-Georgia who returned to the company after serving in the Armed Forces. The complaints charged the company with violations of 38 U.S.C. § 2021 for its failure to include time spent by the employees in military service in the credit and payments of amounts under the basic benefit and savings plans. Lockheed-Georgia has answered the complaints, denying liability and proferring certain affirmative defenses.

Lockheed-Georgia became aware of the pendency of the present action when it was contacted by the United States Attorney's office representing the Plaintiffs in the above-referenced litigation. The United States Attorney's office suggested holding these cases in abeyance until this Court could decide the present action, the implication being that a decision by this Court would in some way be dispositive of the pending litigation.

This Court was likewise assured that the present case would be dispositive of a large number of pending

1. *Jack C. Martin v. Lockheed-Georgia Company*, United States District Court for the Northern District of Georgia, Rome Division, Civil Action File No. C76-172R; *Charles T. Reynolds v. Lockheed-Georgia Company*, United States District Court for the Northern District of Georgia, Atlanta Division, Civil Action File No. C76-2054A; *Kenneth H. Thompson v. Lockheed-Georgia Company*, United States District Court for the Northern District of Georgia, Rome Division, Civil Action File No. C76-171R; *Thomas J. Willis v. Lockheed-Georgia Company*, United States District Court for the Northern District of Georgia, Atlanta Division, Civil Action File No. C76-2055A.

actions. At page 6 of his memorandum in response to the Petition for Certiorari, the Solicitor General argued that ten "pension" cases are pending in district courts, and that thirty-six more are ready for filing. These cases presumably include the pending Lockheed litigation. The Solicitor General also argued that pension plans, while not identical, uniformly require work requirements in a continuous number of years and calculate the amount of pension benefits by reference to the number of years in which work is performed. Because of this similarity, the Solicitor General suggested at pages 5-6 of his memorandum that a ruling by this Court would dispose of the pending litigation.

Lockheed thus has a vital interest in the present case. As a division of a nationwide employer, with facilities in several judicial circuits, it is concerned with the impact of conflicting decisions among circuit courts regarding the employment rights of servicemen. As a major defense contractor, with a large number of veteran employees, the effect of a decision in this case on Lockheed's benefit programs will be significant. Furthermore, Lockheed-Georgia is a defendant in pending litigation involving fringe benefits which are not pensions, and which present related, but fundamentally distinct questions not specifically before the Court in the present case. Lockheed-Georgia does not therefore wish to become homogenized into a class of defendant/employers whose fringe benefit programs will be effectively adjudicated by a holding in this case, under the guise that a ruling herein will be dispositive of all pending and related fringe benefit litigation.

Because of the importance of the issues raised in

this case, Lockheed-Georgia sought and received consent of Petitioner and Respondent to file its brief amicus curiae.[2] Hence, Lockheed-Georgia files this brief to present views on the serious questions raised which it believes may not be fully or adequately presented by the parties.

SUMMARY OF ARGUMENT

The Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. § 2021 (formerly codified as the Military Selective Service Act at 50 U.S.C. App. § 459) provides two separate mandates. The first requires that a returning veteran be restored to his former job or like position "without loss of seniority, status, and pay" and the second entitled returning veterans to participate "in insurance and other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence." 38 U.S.C. § 2021(b)(1). It thus seems clear that Congress intended to treat "seniority" perquisites, which have to be categorically restored to a veteran, differently from "other benefits," which are subject only to nondiscriminatory restoration. The statute, however, fails to define what rights are perquisites of seniority and what are other benefits. Nevertheless, in this Court's opinions in *Accardi v. Pennsylvania R.R.*, 383 U.S. 225, 86 S.Ct. 768, 15 L.Ed.2d 717 (1966), *Eagar v. Magma Copper Co.*, 389 U.S. 323, 88 S.Ct. 503, 19 L.Ed.2d 557 (1967), and *Foster v. Dravo Corp.*, 420 U.S. 92, 95 S.Ct. 879, 43 L.Ed.2d

2. The written consent of both parties to this action is attached to the Proof of Service for this brief filed with the Clerk of this Court.

44 (1975), a definition and concept of seniority have remained constant: the Court has been unwilling to apply the seniority provisions of the veterans' statute to a benefit that is conditioned upon compliance with a *bona fide* prospective work requirement. This Court's analysis has been traced by the lower federal courts, except in the case *sub judice*, when considering pension benefits.

On the basis of this definition and concept of seniority, the decision below should be reversed.

ARGUMENT

On the eve of World War II, Congress enacted the Selective Training and Service Act of 1940, 54 Stat. 885, section 8 of which provided for the reemployment rights of qualified veterans. These provisions have been periodically reenacted without significant change and are now codified as the "Vietnam Era Veterans' Readjustment Assistance Act of 1974" at 38 U.S.C. § 2021. In pertinent part the statute reads (with emphasis added where appropriate):

> (a) In the case of any person who is inducted into the Armed Forces of the United States under the Military Selective Service Act (or under any prior or subsequent corresponding law) for training and service and who leaves a position (other than a temporary position) in the employ of any employer in order to perform such training and service, and (1) receives a certificate described in section 9(a) of the Military Selective Service Act (relating to the satisfactory completion of military service), and (2) makes application for reemploy-

ment within ninety days after such person is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year —

* * * *

(B) If such position was in the employ of a State, or political subdivision thereof, or a private employer, such person shall —

(i) if still qualified to perform the duties of such position, be restored by such employer or his successor in interest to such position or *to a position of like seniority, status, and pay*; . . . .

* * *

(b) (1) Any person who is restored to or employed in a position in accordance with the provisions of clause (A) or (B) or subsection (a) of this section *shall be considered as having been on furlough or leave of absence during such person's period of training and service in the Armed Forces, shall be so restored or reemployed without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces*, and shall not be discharged from such position without cause within one year after such restoration or reemployment.

(2) *It is hereby declared to be the sense of the Congress that any person* who is restored to or employed in a position in accordance with the pro-

visions of Clause (A) or (B) of subsection (a) of this section *should be so restored or reemployed in such manner as to give such person such status in his employment as he would have enjoyed if such person had continued in such employment continuously from the time of such person's entering the Armed Forces until the time of such person's restoration to such employment, or reemployment.*

* * *

Summarizing the relevant portions of the statute, an employer must restore a qualified veteran to his pre-service position, or one of "like seniority, status, and pay," 38 U.S.C. § 2021(a)(B)(i), must consider a returning veteran "as having been on furlough or leave of absence," 38 U.S.C. § 2021(b)(1), must restore the employee "without loss of seniority," 38 U.S.C. § 2021(b)(1), and must permit him "to participate in insurance and other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted." 38 U.S.C. § 2021(b)(1).

The purpose of the veterans' statute is obvious: "to protect veterans returning to civilian jobs from being penalized for having served in the Armed Forces." *Foster v. Dravo Corp.*, 420 U.S. 92, 93, 95 S.Ct. 879, 43 L.Ed.2d 44, 48 (1975). To this end Congress provided that a returning veteran (1) shall be "restored or reemployed without loss of *seniority*," and (2) "shall be entitled to participate in insurance or *other benefits* offered by the employer" to the same extent as if he had been on furlough or leave of absence. 38 U.S.C. § 2021(b)(1) (emphasis added). It seems clear that

Congress intended to treat "seniority" perquisites, which have to be categorically restored to a veteran, differently from "other benefits," which are subject only to nondiscriminatory restoration. The statute, unfortunately, fails to define what rights are perquisites of seniority and what are other benefits. It is the statutory ambiguity, as this Court is well-aware, which has resulted in frequent litigation "to define each of these terms and to determine their proper application to contemporary bargaining agreements, which commonly govern an extremely broad range of the conditions of an employer-employee relationship" (*e.g.*, vacation pay, sick leave, pensions, life insurance, health care, and supplemental unemployment payments). Silver, *Operation of the "Escalator Clause" in Fringe Benefit Cases*, 60 Minn. L. Rev. 45, 47-48 (1975).

At least in part, the difficulty with application of the statute lies in its implicit assumption that benefits of employment are either totally dependent on seniority or not dependent on seniority at all. *See* Ross, *Returning Veterans' Rights to Fringe Benefits After Foster v. Dravo Corporation*, 68 Military L. Rev. 55, 56-57 (1975). As stated by the Ninth Circuit Court of Appeals, "[t]he statute assumes that there exists a distinct line between rewards for status and compensation for work." *Smith v. Industrial Employers & Distributors Association*, 546 F.2d 314, 317 (9th Cir. 1976). But as further noted in the *Smith* case:

> In reality many benefits . . . recompense employees for both status and work. These hybrids are out of place in a system which recognizes only purebreds. Hence, we must "unmix" the benefit in a way never foreseen by the contracting parties or the Congress, to determine which characteristics trace their lineage to seniority.

Smith v. Industrial Employers & Distributors Association, supra, 546 F.2d at 317, *citing, Accardi v. Pennsylvania R.R.*, 383 U.S. 225, 229-31, 86 S.Ct. 768, 15 L.Ed.2d 717, 720-722 (1966) and Haggard, *Veterans' Reemployment Rights and the Escalator Principle*, 51 B.U.L. Rev. 539, 577 (1971).

As long as litigation under the statute centered on benefits which were traditionally considered seniority rights (*e.g.*, lay-off, recall, and promotion), no great problem was raised by the arbitrariness of the statute's classification. *See, e.g., McKinney v. Missouri-Kansas-Texas R.R.*, 357 U.S. 265, 78 S.Ct. 1222, 2 L.Ed.2d 1305 (1958); *Siaskiewicz v. General Electric Co.*, 166 F.2d 463 (2nd Cir. 1948). However, in recent years, as litigation has turned to benefits which accrue only in part (or not at all) as a result of seniority, and in part as a reward or compensation for work actually performed (such as vacation pay and severance benefits), the difficulties inherent in the application of the statute have become evident. As a result, this Court has been increasingly called upon to establish principles of decision for a uniform approach in benefit cases.

The first step taken by the Court to extend the protection of the veteran statute to a benefit never before treated as a traditional element of seniority was *Accardi v. Pennsylvania R.R.*, 383 U.S. 225, 86 S.Ct. 768, 15 L.Ed.2d 717 (1966). The issue in *Accardi* involved the payment of severance benefits to tugboat firemen whose jobs were abolished. The amount of

the benefit was to be based on the number of years of "compensated service," to be calculated by crediting any year in which an employee worked at least one day in no less than seven different months. Suit was brought by veteran-employees when the company refused to consider their military service as "compensated service."

In *Accardi*, this Court announced its intention to define "seniority" without limiting it to its traditional meaning, and without limiting it to the meaning given it under collective bargaining agreements. The Court found that the real nature of the benefit was compensation for loss of jobs, and the most accurate characterization of the benefit to be for loss of seniority. In so finding, the Court evidenced an unwillingness to be bound by definitions in a collective bargaining agreement.

The *Accardi* opinion was doubtless an important interpretation of the statute. It has been cited by subsequent courts in support of extending to veterans virtually every type of fringe benefit available. *See, e.g., Locaynia v. American Airlines, Inc.*, 457 F.2d 1253 (9th Cir.), *cert. denied*, 409 U.S. 982, 93 S.Ct. 317, 34 L.Ed.2d 246 (1972); *Connett v. Automatic Electric Co.*, 323 F.Supp. 1373 (N.D.Ill. 1971). It could well be cited for the proposition that veterans are entitled to wages, since arguably wages would "automatically accrue" but for induction into the service. *See*, Ross, *Returning Veterans' Rights to Fringe Benefits After Foster v. Dravo Corporation*, 68 Military L. Rev. 55 (1975); Silver, *Operation of the "Escalator Clause" in Fringe Benefit Cases*, 60 Minn. L. Rev. 45 (1975).

But the opinion was limited in an important respect. The Court indicated a reluctance to treat as "seniority" a benefit that was conditioned on a valid and *bona fide* work requirement. The argument that the work requirement in *Accardi* made the payments in question deferred compensation failed, the Court properly noting that an employee could obtain credit for a full year's service by working only seven carefully selected days. This "bizarre result," occasioned by a sham and transparent work requirement, showed that the payments were for longevity and not for time actually worked. Nevertheless, the Court in *Accardi* indicated that under the scheme of the veterans' statute, compensation conditioned on a *bona fide* work requirement was more likely to be considered "other benefits," in the nature of deferred compensation, and less likely to be considered "seniority."

It should be noted that in *Accardi* payments were made on the basis of retrospective calculations. The severance plan in *Accardi* was an attempt to compensate employees for work performed in the past. The benefit was negotiated retrospectively, and therefore could not have the necessary relationship between benefit and work performed that is found in benefit plans negotiated and calculated prospectively. Plans of this type, such as Lockheed's, are negotiated as part of an hourly economic compensation package for work actually performed. Furthermore, the costs of these plans are part of the overhead burden for government contractors such as Lockheed that is recognized by the Federal government in the negotiation of, and payments under, contracts only to the extent that these costs are identified at the time of the negotiation or payment.

Approximately one year after *Accardi*, the Court again considered the scope of the veterans' statute. In *Eagar v. Magma Copper Co.*, 389 U.S. 323, 88 S.Ct. 503, 19 L.Ed.2d 557 (1967) (per curiam), the collective bargaining agreement required that employees work at least 75% of their available shifts within a year, and also required that they be employed with the company on the one-year anniversary date of their employment in order to qualify for vacation benefits. Eagar had actually worked more than 75% of the available shifts since he began his employment on March 12, 1958, but was called to active duty on March 6, 1959 — seven days before the anniversary date of his employment. Considering compliance with actual work requirements, Eagar had fully earned his vacation pay. He was denied his benefits solely because he was not at work on an arbitrary date.

The Court reversed a decision refusing Eagar his vacation benefits in a per curiam opinion only citing *Accardi*. Eagar had complied with the *bona fide* work requirement of his employer by working 75% of his shifts. Requiring presence at work on an arbitrary date was not considered to be a valid work requirement, but more a function of longevity or seniority.

Eagar is, therefore, entirely consistent with this Court's earlier opinion in *Accardi*. In both cases, the Court indicated a reluctance to treat as a perquisite of seniority a benefit conditioned on a valid and *bona fide* work requirement.

The most recent pronouncement by this Court on the application of the veterans' statute is its opinion in *Foster v. Dravo Corp.*, 420 U.S. 92, 95 S.Ct. 879, 43

L.Ed.2d 44 (1975). In *Foster*, the plaintiff worked for nine weeks in 1967 and then entered the Armed Forces. He also worked for thirteen weeks in 1968 upon his release from active duty. However, the company's collective bargaining agreement required an employee to be on the job at least twenty-five weeks in any calendar year to qualify for vacation pay, which was a *bona fide* work requirement. The Court, in affirming a denial of Foster's claim for vacation pay in both 1967 and 1968, deferred to the presence of a real — not illusory — work requirement, a factor significantly absent in both *Accardi* and *Magma Copper*. According to the Court:

> Generally the presence of a work requirement is strong evidence that the benefit in question was intended as a form of compensation . . . . [W]here the work requirement constitutes a bona fide effort to compensate for work actually performed, the fact that it correlates only loosely with the benefit is not enough to invoke the statutory guarantee.

Foster v. Dravo Corp., supra, 420 U.S. at 99, 43 L.Ed.2d at 52.

Despite the variety of benefits and plans involved in the veteran cases to come before the Court, its analysis has remained constant. The Court has been unwilling to apply the seniority provisions of the veterans' statute to a benefit — any benefit — that is conditioned upon compliance with a *bona fide* work requirement. The teachings of *Accardi* and *Magma Copper*, that the Court will not be bound by the labels placed on benefits by the parties, nor misled by work requirements that are illusory or transparent, do not indicate otherwise. At bottom, if a work require-

ment is substantial and *bona fide*, a benefit premised on that requirement must be earned on the job by a returning serviceman, just as it must be earned by his colleagues, whether or not they had prior military service.

There thus emerges from these opinions a definition of seniority that is useful in analyzing all types of benefits. This definition is articulated in the recent Ninth Circuit opinion of *Smith v. Industrial Employers & Distributors Association*, 546 F.2d 314, 317 (9th Cir. 1976):

> In general, then, we may define seniority benefits as those which reward longevity, not those which compensate for work actually performed. *See also Foster v. Dravo Corp.*, 1975, 420 U.S. 92, 97, 95 S.Ct. 879, 43 L.Ed.2d 44; *Austin v. Sears, Roebuck & Co.*, 9th Cir., 1975, 504 F.2d 1033, 1035.

One can see this definition at work in the lower Federal court decisions that have dealt with pension benefits.

The first case ever to apply the provisions of the statute to funded pension benefits was *Litwicki v. Pittsburgh Plate Glass Industries, Inc.*, 505 F.2d 189 (3rd Cir. 1974), a case which although decided before *Foster v. Dravo Corp.*, presaged its analysis and reasoning. The pension plan under consideration in that case provided that the amount of an employee's benefits were determined by the number of hours *actually worked* by the employee (some 1,500 hours were needed to obtain credit for a full year). The Third Circuit, noting that "[t]his work requirement is inconsistent with an intent to accord pension benefits on the basis of an employee's longevity with PPG," held that the

benefits provided by the plan were not "perquisites of seniority under the Act" but were essentially "deferred compensation based upon a substantial work requirement." *Litwicki v. Pittsburgh Plate Glass Industries, Inc., supra*, 505 F.2d at 193. Although the particular plan under review in *Litwicki* led the court to conclude that the pension agreement itself required that military service time be credited toward the vesting (but not amount) of pension rights, the court explicitly held that "neither for purposes of vesting nor for purposes of calculating amount of pension benefits, does the Act require that credit be given for military service." *Id.* at 193.

The *Litwicki* analysis has been embraced by all the Courts of Appeals which have subsequently considered pension plans and the statute, except the Fifth Circuit in the instant case. For example, in *Jackson v. Beech Aircraft Corp.*, 517 F.2d 1322 (10th Cir. 1975), the court, relying on both *Litwicki* and *Foster*, held that retirement benefits, eligibility for longevity pay, length of vacation, and sick leave credits — all tied to a substantial *bona fide* work requirement — were not seniority rights protected by the statute. Consequently, the corporation's returning veterans were not entitled to credit for their service time in computing the benefits due them.

Likewise, in *La Pinta v. Ohio Crankshaft Division, Park-Ohio Industries, Inc.*, 77 CCH Labor Cases ¶ 11,156 (N.D.Ohio 1975), *appeal pending*, Sixth Circuit No. 76-1158, the court held that a returning serviceman was not entitled, under either the statute or his employer's plan, to credit for his time spent in military service, either for the calculation of the amount of his

pension or for the vesting of his pension rights. The court so held because the company's plan represented a form of deferred compensation which rewarded and compensated for actual work performed (some 1,700 hours being needed for full credit for a year) and was not a disguised perquisite of seniority.

The most recent circuit court decision to consider the question of pension benefits is *Smith v. Industrial Employers & Distributors Association*, 546 F.2d 314 (9th Cir. 1976). In *Smith*, a veteran sought to obtain credit under a pension plan for years of military service when he was absent from employment. An important distinction is emphasized in *Smith* because of the effective date of the pension plan. The plan in *Smith* was established in 1956, and provided for benefits on the basis of both future and past employment.

As to future employment, there was a substantial work requirement. The court had little trouble in holding that such prospective benefits were conditioned on compliance with a valid work requirement and, therefore, constituted earned compensation, not perquisites of seniority. Post-employment credits were given under the plan for employment prior to the institution of the plan. Although these credits were computed with reference to actual past employment, the court concluded that they were in effect rewarding longevity, not actual work on the job. Therefore, the pre-plan credits were properly classified as perquisites of seniority. *Smith v. Industrial Employers & Distributors Association*, *supra*, 546 F.2d at 314.

Smith, is thus completely consistent with this Court's previous opinions interpreting the veterans' statute, most notably *Accardi*. In *Accardi*, the employ-

er was essentially rewarding longevity by instituting a severance pay plan that compensated only for pre-plan work. There were no credits for future employment because the jobs in question were being discontinued. The real, and in fact only nature of the *Accardi* benefits, and the pre-plan benefits in *Smith*, was reward for longevity — not compensation for work to be performed after the establishment of the plan.[3]

The only case to hold that pension benefits should be considered as perquisites of seniority, as opposed to compensation for work performed, is the case *sub judice*. The error in this decision is readily apparent when examined in light of this Court's earlier opinions previously discussed herein.

The terms and conditions of the Alabama Power Company pension plan are fully set forth in the Appendix filed in this case at pages 54-102. Under this plan, although there is a substantial work requirement, the number of hours worked bears no direct relation

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3. The Lockheed basic benefit plan is not a pension plan or a wage security plan. When it was initiated there was no provision made to reward employees for employment predating the plan, as has been the practice followed by many employers which have established pension plans or income maintenance plans when faced with unanticipated large scale lay-offs. The Lockheed plan has no provisions for pre-plan contributions—it began in 1965 and under it the company pays $20 a quarter for every quarter after the adoption of the plan an employee is "on active status for the quarter." Thus, unlike the plans interpreted in both *Accardi* and *Smith*, the Lockheed basic benefit plan rewards only future employment, and benefits accruing under the plan can be considered only as deferred compensation predicated on a substantial work requirement, not perquisites of seniority.

to the amount of benefits received. In the absence of this direct relationship, the district judge herein mistakenly assumed that the plan was compensation, not on the basis of actual work, but on the basis of seniority. *Davis v. Alabama Power Co.*, *supra*, 383 F. Supp. 880, 887, 889 (N.D.Ala. 1974), *aff'd*, 535 F.2d 657 (5th Cir. 1976). The Fifth Circuit offered no new analysis, it merely adopted the district court's opinion without comment.

This opinion was written, however, without the benefit of this Court's analysis in *Foster v. Dravo Corp.*, 420 U.S. 92, 95 S.Ct. 879, 43 L.Ed.2d 44 (1975). As discussed, *Foster* teaches that where a work requirement "constitutes a bona fide effort to compensate for work actually performed, the fact that it correlates only loosely with the benefit is not enough to invoke the statutory guarantee." *Foster v. Dravo Corp.*, *supra*, 420 U.S. at 99-100, 43 L.Ed.2d at 52. This Court in *Foster* expressly refused to adopt an argument similar to the one made by the plaintiff in *Davis* that there had to be such a close correlation. In light of *Foster*, the decision in the present case should be reversed.

CONCLUSION

The preceding analysis is not meant to be an exhaustive survey of all the cases which purport to deal with veterans' reemployment rights. However, it is clear that under this Court's recent pronouncements, as interpreted by the great majority of lower Federal courts that have considered the veterans' statute, the decision in the case *sub judice* is erroneous. The district court's holding, affirmed and adopted by the Court of Appeals, that a direct relationship between actual work and benefits received is needed in order to consider a fringe benefit as compensation, rather than as a perquisite of seniority, was based on a mistaken assumption which this Court dispelled in *Foster*. Therefore, the decision below should be reversed.

Respectfully submitted,

Of Counsel:
RALPH H. GREIL
Troutman, Sanders, Lockerman & Ashmore

CARL E. SANDERS
MICHAEL C. MURPHY
JOHN L. TAYLOR, JR.
Troutman, Sanders, Lockerman & Ashmore
1400 Candler Building
Atlanta, Georgia 30303

ROBERT P. BARTON
Assistant Counsel
Lockheed-Georgia Company

Attorneys for Amicus Curiae Lockheed-Georgia Company, a Division of Lockheed Aircraft Corporation

February 1977